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Paper No. 16

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SEP 09 2002

In re
Robert W. Brown and Bruce A. Kade
Reissue Application No. 09/585,788
Filing Date: June 5, 2000
Reissue of Patent No. 5,759,606
Original Issue Date: June 2, 1998
Attorney Docket No. RE-001

**OFFICE OF PETITIONS
DECISION ON PETITION**

This is in response to the petition under 37 CFR 1.137(b), filed May 15, 2002.

The petition is **DISMISSED** without consideration on the merits.

Any renewed petition must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR §1.137(a)" or "Renewed Petition under 37 CFR §1.137(b)," as appropriate. Extensions of time under 37 CFR §1.136(a) are permitted.

The above-identified reissue application of patent No. 5,579,606 (Issued June 2, 1998) became abandoned for failure to file a timely and proper response to the final Office action mailed June 29, 2001. This Office action set a shortened statutory period for reply of three (3) months from the mailing date of the action, with extensions of time obtainable under §1.136(a). On August 31, 2001, applicants timely replied with an amendment. However, this amendment was determined by the examiner not to place the application in condition for allowance (Advisory Action mailed October 3, 2001). On October 24, 2001, applicants replied with another amendment, made timely by an accompanying request for extension of time for response within the first month. However, this amendment was also determined by the examiner not to place the application in condition for allowance (Advisory Action mailed January 30, 2002). No proper reply having been received and no further extensions of time obtainable, the application became abandoned effective October 30, 2001. A Notice of Abandonment was mailed on April 1, 2002.

On May 15, 2002, applicants filed the instant petition under § 1.137(b) along with a check for \$620.00 for payment of the petition fee and an authorization to charge any deficiency to Deposit Account No. 11-1257. On May 15, 2002, the petition fee required was \$640.00 for a small entity. However, the funds available in the Deposit Account as presented May 2002 by the Office of Finance were insufficient to pay the deficiency of \$20.00. As of the writing of this decision, the funds in this Deposit Account are insufficient.

35 U.S.C. 41(a) (7) provides that a petition for the revival of an unintentionally abandoned application or for the unintentionally delayed payment of the issue fee must be accompanied by the petition fee set forth in 37 CFR 1.17(m). Thus, unless the circumstances warrant the withdrawal of the holding of abandonment (i.e., it is determined that the application is not properly held abandoned), the payment of a petition fee to obtain the revival of an abandoned application is a statutory prerequisite to revival of the abandoned application, and cannot be waived.

In addition, the phrase "[o]n filing" in 35 U.S.C. 41(a)(7) means that the petition fee is required for the filing (and not merely the grant) of a petition under 37 CFR 1.137. See H.R. Rep. No. 542, 97th Cong., 2d Sess. 6 (1982), reprinted in 1982 U.S.C.C.A.N. 770 ("[t]he fees set forth in this section are due on filing the petition"). Therefore, the Office: (A) will not refund the petition fee required by 37 CFR 1.17(l) or 1.17(m), regardless of whether the petition under 37 CFR 1.137 is dismissed or denied; and (B) will not reach the merits of any petition under 37 CFR 1.137 lacking the requisite petition fee.

As payment of a petition fee to obtain the revival of an abandoned application is a statutory prerequisite to revival of an abandoned application and petitioner has not made such a payment, the petition must be dismissed. Petitioner is reminded that the petition fee must be paid in the amount in effect as of certificate of mailing date under § 1.8 or as of receipt of the payment by the Office. Accordingly, the deficiency may increase with any increase in petition fees effective October 1, 2002.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
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Washington, DC 20231

By FAX: (703) 308-6916
Attn: Office of Petitions

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Telephone inquiries related to this decision should be directed to the undersigned at (703) 305-0309.



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for Patent Examination Policy